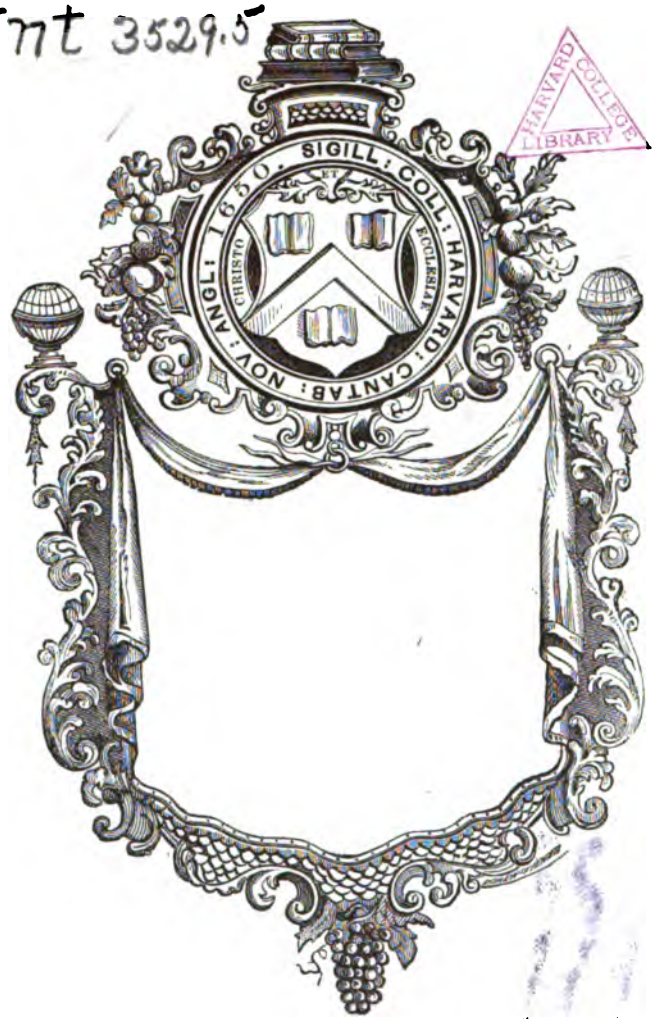

THE LAW OF NATIONALITY.

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To begin with, its source is of doubtful purity; it does not flow generally from justice or the sentiment of personal dignity, but from hatred of the foreigner, and frequently from ignorance. In the opinion of ancient Greece, all foreigners were barbarians; and in that of Rome, enemies. Is it to be believed that there is reason to withdraw from a country where liberty rules, in order to join a nationality of the same race governed by a despot? A group of men who should act in this manner might be considered as "inferior and undeveloped." And justly. Do such men ask themselves what is the object of the state? The state should satisfy certain moral and material wants of men, and if men are connected with a country which gives them these advantages, they should not leave it to join a state which does not give them, whatever be the affinities of race and language. — The preservation of nationality is of secondary importance. History shows us how often nations have become mixed, changed or modified in character. It seems even that an infusion of fresh blood—even barbarian blood—is necessary to prevent old nations from falling into decay. If purity of race were of use to humanity, Providence or nature would have taken some measure to secure it; while it suffices to be born in a country to share the feelings of its people. We have never understood what interest a small group of individuals without history, embedded in a great and powerful state whose history is their own, could have in obstinately remaining in isolation. On the other hand, a nationality small in number performs an impolitic act in withdrawing from a large state to form an independent community. In the present condition of things it is unreasonable. From another point of view, small states are independent only by sufferance. If the six or seven great powers had a less lively sense of the requirements of justice, or if they could agree on the terms of division, the small states would soon be absorbed. It is not sure that humanity or the progress of civilization would suffer thereby; but it is certain that the creation of new small states would be a derangement of the balance established with such difficulty in Europe, for they would simply change masters. It is of small importance to a conquered city whether its garrison belongs to a neighbor of the east or the west. — From the point of view of the progress of humanity, the present condition being given, the small states are in a marked inferiority compared with the great. From the shock of ideas light comes. It results that the more members a nationality has—other things being equal—the more it will contribute to the advancement of science, and the more ideas it will create. Besides, the languages of great countries are studied, and their discoveries are not slow in entering the common domain of civilization. But who learns the languages spoken by one or two millions of persons? The inventions of these countries will be lost for humanity, if the enlightened members of these smaller nationalities do not take them to London, Paris, Berlin, Vienna or some other great centre. There are languages which seem sentenced to perish, as there are nationalities which must, it seems, be lost in others. And why should this process of fusion which was so useful, even so necessary, twenty, ten, or five centuries ago, be stopped to-day? — The union of several nationalities under the same government could not, moreover, be considered as an evil at a time when Switzerland or Belgium are cited as first among the most happy and prosperous countries. Can not each of the fractions of these peoples preserve its originality if it wishes? History shows us, besides, that composite nationalities are superior to nations free of all mixture. Thus, the Romanized Gaul was superior to the druidic Gaul, and the character of modern France dates from the infusion of Germanic blood. The same advantage appears in all states in which the fusion was complete. In countries where the nationalities brought in contact have remained or become hostile through the fault of the government, the mixture has not had its effect; but let equal liberty be given to all, and the peaceable friction of varied aptitudes will produce its usual result. — The principle of nationalities, as we have formulated it, does not possess absolute legitimateness. While recognizing in each one the right to choose a nationality to which he prefers to belong, we should consider circumstances which exercise a power similar to this right and limit its application, or at least render its exercise harmful to individuals, to nations, and to humanity. In the present state of things, the absolute application of the principle of nationalities is even completely impossible; it would have to struggle against material and moral obstacles sometimes invincible, or at least against powerful interests. One of these interests, with slender right, however, in spite of the number of its partisans, would appear under the form of the theory of *natural frontiers*, and this theory is an excellent criterion in distinguishing sincere adherents of the principle of nationalities from those who look on it merely as a weapon. The theory of natural frontiers is an argument of the conqueror, and the principle of nationalities is opposed to conquest. But there are persons who are in favor both of the frontiers and of nationalities, according to the wants of the moment. If our doctrine were to be summed up in the form of a proposition, we should perhaps say that, generally, the principle of nationalities is legitimate when it tends to unite, in a compact whole, scattered groups of population, and illegitimate when it tends to divide a state. When the two operations must take place at once, the verdict of history will be in accordance with the circumstances of the case. It will not say, Woe to the conquered, but Woe to the mistaken. MAURICE BLOCK.

NATIONALITY, Law of. *Definition of Terms.* The word *nation* is used in two senses. It means

sometimes a "folk" or people, whose natural unity is demonstrated chiefly (but not solely) by the use of a common language, but whose territorial limits do not necessarily coincide with those of any political community. With the nation in this sense, with the natural nation, as it may be termed, the law has nothing to do. The law knows nations only as political communities, as sovereign and independent states. *Nationality*, therefore, as a legal attribute of persons, is connection with a certain body politic, membership in a particular state. — The members of a state are called its *subjects* or *citizens*. The former term, if properly construed, is applicable to the people of any nation, without regard to the form of government; for every state is based upon the subjection of its members to its sovereignty. But the word subject has become historically associated with the theories of feudal and absolute monarchy, and has thus fallen into disfavor. It is officially employed, at the present day, in no constitutionally governed country except Great Britain. We use in its stead the word citizen, which has the disadvantage of a double meaning. For primarily and strictly only the active members of the body politic, the holders of political rights, are citizens; but in the official language of the United States the term citizen includes all persons of American nationality, whether possessed of political rights or not. French and German jurists avoid this ambiguity without using the term subject, distinguishing citizens in the strict sense (*citoyens, Staatsbürger,*) from members of the state or nation (*nationaux, Staatsangehörige.*) — In federal states an additional ambiguity attaches itself to the word citizenship: it is employed to describe membership in one of the several federated commonwealths as well as membership in the nation. No such uncertainty of meaning attends the use of the word nationality. But in the absence of a corresponding concrete term, such as the French *national* and the German *Reichsangehöriger*, we are obliged to make use of the word citizen.

Legal Importance of Nationality. The importance of nationality at civil or private law has greatly diminished in modern times. At ancient law all rights were dependent upon citizenship: the foreigner had no rights, not even the fundamental rights of life and liberty, except by virtue of treaty. Modern jurisprudence, however, has substituted for the national the humanitarian principle: civil rights appertain to man as man, not to man as citizen. The exceptions to this rule, numerous and important a hundred years ago (*droit d'aubaine*, etc.) have now generally disappeared. In several states of the American Union aliens are still unable to own real property unless they have declared their intention of becoming citizens. In several European countries aliens are excluded from the exercise of certain trades and professions. But modern law is everywhere tending toward the rule of the Italian civil code: "The foreigner is admitted to all the civil rights belonging to citizens." — At civil law, accordingly, questions of nationality are seldom material. The same is true of criminal law. Only the citizen, indeed, can be called to account for acts done out of the limits of the state; but as regards offenses committed within the territory of a state, the alien, unless he be an exterritorial person, is subjected as completely as is the citizen to its criminal jurisdiction. — At constitutional law, on the other hand, nationality is of prime importance. It is true that constitutional law concerns itself for the most part with active citizens only; but to be an active citizen, to be held to political duties and to hold political rights, one must first be a member of the nation. The alien, therefore, in the rule, has no vote and is incapable of holding office. On the other hand, he is usually exempted from essentially political duties; *e. g.*, he is not held to military service. Exceptions to these rules may indeed be found here and there in the legislation of single states. Several commonwealths of the American Union permit resident aliens to vote in national as well as in state elections. Nearly all states admit aliens to certain offices: some states, however, make such admission a mode of naturalization. During our civil war resident aliens who had declared their intention of becoming citizens of the United States were subjected to conscription. Protest having been made by the representatives of the leading foreign powers, the aliens in question were granted sixty-five days in which to leave the country. The foreign powers interested acquiesced in this arrangement, maintaining, nevertheless, that the action of the American government was in violation of international comity. — More numerous by far than the internal questions of nationality are those which arise in the international intercourse of modern states. International law deals not only with the relations of states to each other, but also with the relations of states to the subjects of other states. Relations of the latter class are governed by the following rules: 1. Every state is bound and entitled to protect its subjects. The obligation to protect is an obligation of municipal law solely, each state according or withholding its protection as it sees fit. The right to protect is an international right, and its content is determined by international law and usage. In considering the limits of this right it must always be remembered that every state is sovereign in its own territory, and that the alien, unless invested by law or treaty with the privilege of exterritoriality, is subjected within its borders to the authority of its laws. In the exercise of the right of protection, the alien's government can demand only that he be recognized and treated as its subject; *e. g.*, that all treaty privileges granted its subjects be extended to him. Beyond this point, protection is a matter of comity, not of right. By the comity of nations, each state is permitted to watch over the interests of its subjects in foreign states: particularly to see that they receive justice. Not abstract justice, how-

ever, nor what the protecting state holds to be justice, but such justice as is afforded by the law of the land. Protection of the alien against the law of the land is possible only by force or threat of force. Such protection may be justifiable, but its justification is not to be found in the law which governs the peaceful intercourse of nations. Such protection is an invasion of a foreign sovereignty; *i. e.*, an act of war. — 2. Every state has the right to expel aliens from its territory. The expelling state may return the alien to the territory of the state to which he belongs (*droit de renvoi*) and the latter state is bound to receive him.

Determination of Nationality. Questions of nationality, whether internal or international, are determined in the first instance by the organic or constitutional law of the state or states interested. Each state decides what individuals compose it: who are and who are not its members. But the application of municipal law to international questions results in this case, as in most cases, in conflicts and uncertainties. It frequently happens that a person is lawfully claimed as subject by two states; it is possible that the same individual may owe allegiance, on different grounds, to as many as three different states. It sometimes happens, on the other hand, that a person is not recognized as its member by any state, that he is "*heimathlos.*" International law is forced to deal with these difficulties; it may not determine to what state the individual belongs; but it must at least decide how he shall be treated.

Plan of Treatment. The law of nationality will be described, in the following pages, I. In its historical development; II. In its present condition, by comparison of existing legislations.

HISTORICAL RÉSUMÉ.

Roman Law. The law which determined nationality in the ancient world is commonly known as the *jus sanguinis*, the law of blood or system of descent. It would be more accurate to term it the *jus familiæ*. The ancient state was based upon the family: it was indeed, originally, simply a collection of families. All persons, therefore, who were members of a citizen family were members of the state. But in addition to the wife and the children born of her, the Roman family included adopted children and slaves. Roman citizenship was accordingly acquired not only through descent from a citizen father, but also by marriage to a citizen, adoption by a citizen, and emancipation from slavery—*manumission*—on the part of a citizen master. — The foreign family, on the other hand, did not cease to be foreign by any term of residence within the limits of the state; the descendants of the "peregrine" remained peregrines to the remotest generation, unless adopted, *i. e.*, naturalized by the state itself. Such naturalization was frequently conferred upon entire communities. All the Italian allies were invested with Roman citizenship during the republican period, and in the third century of the Christian era an edict of Caracalla made all the free inhabitants of the empire citizens. The right of citizenship, however, was not thereby made territorial; the edict naturalized those persons only who were domiciled in Roman territory at the date of its publication; it did not affect peregrines who subsequently acquired such domicile. — The connection between the state and the individual could be severed by either party: the state could exile the citizen, and the citizen, at least during the republican period, could expatriate himself. But since loss of citizenship meant the extinction of all property rights and the dissolution of all family ties; and since the exile, unless adopted by some other state, remained outside of the social pale, unprotected by human law, the Roman right of expatriation meant only the right of choosing exile in preference to death; a right of some significance before the *leges Porciæ* abolished the death penalty.

Early German Law. Membership in the primitive German state—if the word state can properly be applied to those loosely organized and migratory tribes which overthrew and dismembered the Roman empire—was acquired, as among the Romans, by descent. The child derived its civil status from its parents, without reference to its place of birth or of residence. During the period of the great migrations, from the fourth to the sixth century, the German tribes were gradually fused into larger monarchic states. The bond of union in these new states was the royal authority: it was the subjection of the individual to that authority which made him a member of the state. Allegiance thus became the basis of nationality. — Allegiance was primarily established by the oath of the subject: *sacramentum fidelitatis* at Frank law, *hyld-ath* in Saxon England. In return for the allegiance of the subject the king was bound to afford him protection: *mundium*. This reciprocal relation could not be dissolved by the act of the subject; the obligation of allegiance endured so long as the king lived, but was not transferred to his successor. A change of rulers necessitated a renewal of the contract. — When, with the close of the period of the migrations, these new states obtained comparatively fixed boundaries, the royal authority gradually became territorial. The oath of allegiance was retained, but was now exacted as a matter of right. All the inhabitants of the king's territory were held to take the oath on reaching the age of twelve. But habitancy or domicile being a matter not always easy of proof, and the place of birth being in the vast majority of cases the place of habitancy as well, the birth-place naturally became the criterion of habitancy and thus of nationality. It was no longer descent, therefore, which determined nationality, nor voluntary contract; but the fact of birth in the king's territory (*jus soli*). — Such seems to have been the general development

of the German law of nationality on the continent and in England. Such in particular was the legal development among the Franks; and with the establishment of the Frankish empire the law of the Franks became, in this matter at least, the law of continental Europe. It was this law which the Northman Hrolf found in force in the lands of which he made the duchy of Normandy; and through the Norman conquest of England the Frankish law of Normandy became one of the sources of the English common law of allegiance.

Effects of Feudalism. The system of nationality which we have just described was not, as is frequently assumed, of feudal origin. The German theory of allegiance and the feudal theory have something in common, and may perhaps be traced to a common starting-point. They have in common a reciprocal relation of service and protection; and the relation between the German prince and his *comitatus*, as described by Tacitus, was no other than this. But the German law of allegiance was not a product of feudal ideas: its development antedated that of feudalism. It governed the relation between subject and sovereign in that Frankish empire which feudalism helped to destroy. — With the disruption of the Frankish empire there arose in Europe a number of feudal monarchies. Two centuries later the Norman conquest established in England, where feudalism had already begun to develop itself, a monarchy more typically feudal than any on the continent. The effect of the feudal system upon the relation between subject and sovereign was, however, widely different in England and on the continent. In England the bond between subject and sovereign was strengthened. The theory that the king was owner of all the land in the realm made the monarchy more emphatically territorial than before, and gave to the *jus soli* a more logical basis. To the general duty of allegiance was added the special duty established by the vassal's special oath of fealty. But there was no merger of these duties: the feudal obligation did not take the place of the general obligation of allegiance. And, what was more important still, the feudal obligation of the sub-vassal to his immediate lord was not allowed to affect his prior and paramount duty to the king. In the continental monarchies, on the other hand, the obligation of the lower vassals to their immediate lords became in fact, whatever may have been the theory, more important than their allegiance to the king. Many of the most important royal rights were given in hereditary fee to the crown-vassals and by these again to their sub-vassals. Interposing thus a series of liege lords between the king and the people, feudalism weakened and in its extreme development destroyed the bond between the state and the individual: it disintegrated the nation. In Germany, where feudalism actually reached this extreme development, membership in the empire became, except as regarded the crown-vassals or imperial estates, a conception devoid of all practical consequence. The important bond was that which subsisted between the imperial estates as territorial princes and the inhabitants of their territories (*Landesunterthänigkeit*). This territorial subjection was held to be established by domicile. In western Europe, however, feudalism never reached this extreme development. Toward the end of the middle ages the monarchic authority was re-established in France and Spain in greater fullness than before: these monarchies became absolute. The *jus soli* remained the basis of nationality.

Influence of the Roman Law. Although, as we have seen, the practical value of allegiance was greatly lessened on the continent by the operation of the feudal system, the law of allegiance remained theoretically unchanged throughout the middle ages. The Frankish *jus soli* remained the common law of Europe: nationality continued to be determined by the place of birth. — Toward the end of the middle ages came what is known as the "reception" of the Roman law. The codification of Justinian, almost forgotten for centuries, began to be studied in the twelfth century; and before the end of the sixteenth century that codification had become the generally recognized basis of (continental) European law. Primarily, indeed, of private or civil law only; but the influence of the Roman law upon constitutional and international jurisprudence was very great. The leading writers on public law declared the *jus sanguinis*, or determination of nationality by filiation, to be the true system, and denounced as irrational the principle of indelible allegiance. — Already in Grotius' time no civilized state except England held allegiance to be indissoluble in the old Frankish sense. But it must not therefore be supposed that what is to-day termed the "right of expatriation" was generally recognized. Expatriation was not regarded as a right but as a penalty. By emigration and lapse of time, it was held, the subject might lose the rights of a subject and incur the disabilities of alienage. Whether the duties of allegiance were extinguished with the rights was a question which the legislator commonly left open, and which continental jurisprudence can not be said to have definitely decided until the present century.—The influence of Roman ideas upon the law regulating the original acquisition of nationality was also considerable. As the territorial principalities of Germany rounded themselves to independent and sovereign states, and as the conception of *Staatsangehörigkeit* (membership in the state) supplanted the mediæval conception of *Landesunterthänigkeit* (territorial subjection), the *jus sanguinis* became in every case the basis of nationality. France, however, retained the *jus soli* until the adoption of the code Napoleon; Spain, it seems, until about the middle of this century; and a number of European states retain it still, with certain modifications.

English Law to 1870. The doctrine of nationality, at English common law, is purely German. Certain details are more carefully worked out, but

the fundamental principles are the same as at Frankish law. — It is the personal relation of the individual to the sovereign which determines nationality. The Englishman is not subject to the king because he is an Englishman: he is an Englishman because he is subject to the king of England. It was decided in the seventeenth century (Calvin's case, 7 Coke), that all persons born in Scotland after the accession of James VI. (I.) to the throne of England were natural-born Englishmen, although the union of the two kingdoms was at that time purely personal. A similar result was avoided in the case of the Hanoverian subjects of George I. and his successors, by the provisions of the act of settlement. — The bond which unites the subject to the sovereign is, as at Frankish law, indissoluble by any act of the subject. "Nemo potest exuere patriam": it is not in the power of the subject, by any act of his own, to divest himself of his allegiance. Blackstone explains and defends this rule on the old German ground: the subject owes allegiance because the king affords protection. Until the thirteenth century it seems to have been commonly believed that the allegiance of the subject was suspended by the king's death, as was the case at Frankish law. But Frankish monarchy was elective, and English monarchy became hereditary; the successor to the English throne inherited with the throne the allegiance of his predecessor's subjects. English allegiance thus became "perpetual"; expatriation was possible only with the express consent of the king. As parliament gradually encroached upon the royal functions it was held that even the king's consent was insufficient to divest a subject of his allegiance; an act of the legislature was necessary. No law permitting expatriation was passed until 1870. — The old German oath of allegiance was exacted as late as the eighteenth century; but it is not the oath but the fact of birth in the king's domain which makes the person a subject. Birth in the king's domain means birth "under the actual obedience of the king." Birth in a place over which the king has ever so valid title of sovereignty is, therefore, of no consequence if the place be not in his actual possession. Nor does birth in the king's territory make the child a subject if the parents be exterritorial persons. Conversely, children born to the king or the king's ambassadors in foreign lands are English subjects. — The common law doctrine of nationality thus reduces itself to two rules. Nationality is determined by the place of birth, and the individual can not change his allegiance. The common law was, however, subjected before 1870 to the following important modifications: 1. It came to be recognized as a rule of common law that the subject might freely withdraw his person and property from the jurisdiction of the crown, unless expressly prohibited by the king or by an act of parliament. But the right of emigration is inconsistent, in principle, with the doctrine of indissoluble allegiance. For the latter doctrine rests on the assumption that the subject owes certain duties to the king, in return for the protection which the king affords him, and that it is not permitted to a debtor to extinguish his obligation at his own pleasure. But by withdrawing his person and property from the domain of the king the subject renders his obligation inoperative; the crown has no means left of enforcing its claim. The Frankish law was therefore logically in the right in considering unauthorized emigration to be an act of treason. Authorized emigration, on the other hand, ought logically to have been regarded as expatriation. But the English law permitted the emigration and held to the theory of the continued allegiance of the emigrant. — 2. A series of statutes (25 Edw. III., stat. 2; 7 Ann, c. 5; 4 Geo. II., c. 21; 13 Geo. III., c. 21) conferred English nationality upon the foreign-born children and grandchildren of English subjects. The territorial theory of nationality required that these persons should be considered aliens, and the common law so regarded them. If now the *jus soli* was to be set aside in respect to this class of persons; if the children of English subjects, wherever born, were to be regarded as Englishmen; then the same rule, the *jus sanguinis*, should have been applied to the children of aliens born in England. But here the territorial rule of the common law was left in force; children of aliens born in England were born Englishmen. — 3. The bestowal of British nationality upon aliens, a practice evidently inconsistent with the theory of indelible allegiance, began in England at an early period. It was effected either by letters patent from the king, or by act of parliament. Only in the latter case was the alien said to be *naturalized;* naturalization by act of the crown was termed *denization.* Denization was always special, the royal prerogative being directly exercised in each case. Parliament, on the other hand passed general as well as special acts of naturalization. Of the former sort were the acts of 15 Charles II., c. 15, in favor of foreigners engaged in certain trades and manufactures; 13 Geo. II., c. 3, and 22 Geo. II., c. 45, in favor of foreign seamen serving on English ships; 2 Geo. III., c. 25, in favor of foreign Protestants, serving ten years in the royal American regiment or as engineers in America; and other similar statutes. All these acts, however, were restricted in their operation to certain classes or categories of foreigners. No law prescribing the conditions under which any foreigner might be naturalized existed before the present reign. — The denizen, or person naturalized by virtue of the royal prerogative, had not the full civil status of the natural-born Englishman. He could neither take real property by inheritance, nor could his children, born before denization, take from him. Naturalization by act of parliament, on the other hand, operated retrospectively: the alien and his children were placed, as regarded rights of inheritance, in the same position as if the naturalized person had been born a subject. — The political effect of denization and of naturalization was

identical: the alien, in either case, became a British subject. As such he was, in principle, subjected to all the political duties and possessed of all the political rights of a natural-born Englishman. His rights, however, were seriously curtailed by special statutory exceptions. The acts of 12 and 13 Wm. III., c. 2, and 1 Geo. I., c. 4, excluded all aliens, although naturalized or made denizens, from the privy council, from parliament, and from all offices or places of trust, civil or military. — The common law doctrine of allegiance, from whatever other standpoints it might be criticised, was at least simple and consistent. The modifications above described made the English law of nationality complex and inconsistent. The children of alien parents, born "under the obedience" of the English crown, were English subjects; the children and grandchildren of English parents, born in the territory of a foreign state, were likewise English subjects. The subjects of foreign princes were encouraged to forsake their natural allegiance and to make their knowledge and skill tributary to England's national wealth; they were even invited to withdraw from their sovereigns the services due to them alone, and to enter the army and the fleet of Great Britain: conversely, the British subject was permitted to avoid the obligations of allegiance by emigration; Irish subjects of the crown were even encouraged and aided, in this century, in emigrating not to British colonies only but to the United States; and yet allegiance was held to be indelible. The English system of nationality, as it was in 1870, may fairly be called a system of double nationality. It seems, at first glance, inexplicable that a system of law so certain to impose antagonistic obligations upon the individual, so likely to involve the state in international conflicts, should have continued to exist to so late a day. In the actual operation of this system, however, the diplomatic inconveniences were not so great, nor were the perils to which the individual was exposed so serious, as might have been anticipated. — International conflicts were to a great extent avoided, in cases of double nationality, by the attitude of the English government. In its diplomatic practice England is accustomed frankly to recognize the possibility and, when the thing exists, the fact of double allegiance. It concedes to other states, in such cases, the right which it claims for itself: the right of enforcing its own law of nationality in its own territory. The English government, therefore, refuses to protect its subject against another government which claims his allegiance on grounds recognized by English law as establishing nationality. The person who is English by descent is not protected against a foreign state in whose territory he was born and which claims his allegiance under the *jus soli*. The person who is English by the fact of birth on English soil is not protected against the government which claims him as its subject because his father was its subject. The person who is English on either or both of the above grounds is not protected against the state in which he has caused himself to be naturalized; nor is the naturalized Englishman protected against the state to which his original allegiance is due either by the *jus soli* or the *jus sanguinis*. — This solution of the problem of double nationality lessens the difficulties of the state, but not those of the individual. It may easily be inconvenient, even in time of peace, to owe allegiance to two states. In case of war between those two states the double obligation may become a source of peculiar peril. If the *sujet mixte* voluntarily espouse the cause of either state he commits treason against the other. The fact that he was ignorant of his allegiance to the latter constitutes, of course, no defense. According to some English authorities the plea of compulsion, *e. g.*, conscription, is not a sufficient answer. But the law was, in fact, never enforced in such cases. Æneas Macdonald, educated and domiciled in France, but by birth a subject of Great Britain, was condemned to death in 1745 for bearing arms against England under a French commission. But the sentence was commuted into banishment; *i. e.*, he was simply sent home. During the war of 1812, England undertook to put a number of prisoners, by birth English subjects, by naturalization American citizens, upon trial for treason. The American government isolated twice as many English prisoners and threatened reprisal. England selected twice as many again of the American prisoners and threatened counter-reprisal. But it was obviously impossible for a civilized state to initiate, rightly or wrongly, a general butchery of prisoners of war. The prosecutions for treason were not pressed, and the English-born prisoners were eventually exchanged with the rest. — Neither to the state, then, nor to the individual, was the English law of nationality so perilous as it seemed. This negative fact, however, in no wise explains the development and only partially accounts for the long retention of that law. The positive explanation is as follows. In England, as elsewhere, aliens were subjected until the present century to serious civil disabilities. The most serious of these was their incapacity to hold real property. It was to remove this disability that English nationality was first extended to the foreign-born children of English parents: the act of 25 Edw. III. was an act in favor of "children-heritors." It was chiefly in order to escape this disability that other aliens sought and obtained letters of denization or acts of naturalization. It was thus the attempt to mitigate the working of the law of alienage which made the English law of nationality inconsistent. The law, thus modified, might still have been made consistent by the complete rejection of the *jus soli* and the establishment of the rule that English nationality should be extinguished by naturalization in a foreign state. But these further changes in the law could not be made without creating new cases of disability. The abrogation of the *jus soli* would have made children of aliens, born and brought

up in England, incapable of holding land; and the expatriation of an English subject would have entailed the forfeiture of his real property. The reform of the law of nationality was therefore blocked by the necessity of first reforming the law of alienage. This latter reform was long delayed by prejudices now deemed irrational and apprehensions now seen to be causeless; prejudices and apprehensions nevertheless which long controlled the political thought not of England only but of Europe, and from which we have not wholly freed ourselves in the United States. — Both the law of alienage and the law of nationality were reformed in England by the same statute, the naturalization act of 1870, (33 and 34 Vic., c. 14).

LAW OF THE UNITED STATES.

Federal and State Citizenship. When, in 1776, the American colonies separated themselves from Great Britain and became independent states, these new states claimed that the allegiance which their inhabitants had previously owed the British crown was now transferred to them. But these new states were already members of a confederation. It was a declaration of the confederate government which dissolved the bond of allegiance between the colonists and Great Britain, and it was a treaty between Great Britain and the United States which gave that dissolution of allegiance legal sanction. There existed accordingly from the outset, besides the idea of allegiance due to the several states, the idea of a general allegiance due to the United States. With the establishment of the firmer union of 1787 the national idea obtained clear expression. The constitution was declared to be established by "the people of the United States." The constitution mentioned not only state citizens but also citizens of the United States. Which of the two allegiances was prior and paramount was long a mooted question. This question may now be regarded as determined. The United States is a nation, and the allegiance of the individual to his state is subordinate to his allegiance to the United States. The latter relation only will be here discussed. Membership in the single state is not nationality. A word is necessary, however, as to the peculiar relation which exists in the United States between federal and state citizenship. In some federal states the determination of nationality is left to the several states; the members of these states are, as such, members of the nation. In other federal states, as in our own, the federal law determines nationality, and the member of the nation is also member of the state in which he resides. But in no federation except our own can a person be member of a part, a state, without being also member of the whole, the nation. In the United States there seems to be nothing in the constitution or the laws of congress to prevent a person who is not a citizen of the United States from becoming a state citizen under the laws of a particular state; and such state citizenship does not make him a member of the nation. It may, however, enable him to vote for presidential electors and for congressmen; for the right of suffrage is conferred by state law, and nearly all our states confer this right on all their adult male citizens. Fourteen states give the right of voting to aliens who have declared their intention of becoming United States citizens. We have, accordingly, the further anomaly that the right which is usually deemed the criterion of active citizenship may be exercised in the United States by persons who are not members of the nation. The state citizenship of a citizen of the United States is determined, according to the fourteenth constitutional amendment, by domicile.

"*Citizens*" *and* "*Subjects.*" The constitution of 1787 established no rules governing the acquisition or loss of American nationality. The whole matter, therefore, remained governed by the subsidiary law of the land, the English common law. All persons born in the territory of the United States were its subjects; all persons born out of its territory, though of American parents, were aliens. But the constitution did not speak, nor has any treaty concluded by the executive nor any act of congress ever spoken, of *subjects* of the United States. The written law knows only "citizens." — The courts have frequently declared, and still more frequently assumed without declaring, that citizen and subject, citizenship and nationality, are equivalent terms. But, in the famous case of Scott *vs.* Sanford, 19 Howard, 393, Chief Justice Taney expressed a different opinion: gave to the word citizen a different interpretation. He did not assert, indeed, that the word was to be taken in its original and strictest sense, that only the actual holder of political rights was to be considered a citizen; but he asserted that only that portion of the inhabitants of the United States which possessed political power at the period when the constitution was established, only the "dominant race," could be deemed to be citizens. The "people of the United States," in the meaning of the constitution, "are what we familiarly term the sovereign people." Hence a free negro could not be a citizen, since he was one of that "subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, remained subject to their authority." But of course the free negro, if born in the United States, was born its subject. Hence, in Chief Justice Taney's opinion, there might be subjects of the United States who were not citizens. — Some uncertainty has also been caused by the peculiar political status of the Indian tribes living in the territory of the United States. The members of these tribes have never been regarded as citizens of the United States. But it has been doubted whether they are not its subjects, as being born in its territory. The courts, however, have followed, up to the present time, the theory formulated by Chief Justice Marshall in the Cherokee cases. (5 Peters, 1; 6 Peters, 515.) These tribes are not, indeed, "foreign states,"

nor are their members "foreign citizens or subjects," in the meaning of section two of article three of the constitution. They are not independent nations, for they are under the "protection" of the United States. But they are distinct political communities with which the United States lives on a footing of treaty. The fact that in the exercise of its protecting power the United States practically governs these communities does not alter the legal aspect of the relation. As long as the tribal organization of Indian bands is recognized by the political department of the government as still existing; as long, that is to say, as the national government makes treaties with them, the courts are bound to recognize them as separate nations. (The Kansas Indians, 5 Wallace, 737.) Their members, though born in the territory, are not born "under the obedience" of the United States, and are therefore not its subjects.

Acquisition of United States Citizenship by Birth. Citizenship and nationality being equivalent terms, the acquisition of citizenship in the United States was determined from the outset by the common law of England, *i. e.*, by the *jus soli*. All persons born in the limits and under the actual obedience of the United States were its "natural-born citizens"; and it is in this sense that the phrase is used in section one of article two of the constitution. Conversely, all persons born out of the limits and jurisdiction of the United States, though of citizen parents, were aliens; for the English statutes by which these persons were naturalized were not part of our law. The naturalization act of March 20, 1790, declared that "the children of citizens of the United States that may be born beyond sea or out of the limits of the United States shall be held as natural-born citizens; provided that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." A similar clause appeared in all the subsequent naturalization acts, down to that of 1802. The law at present regulating this matter is the act of Feb. 10, 1855, (Rev. Stat., 1993). This act refers only to the children of citizen *fathers*, and such children are declared to be citizens, not natural-born citizens. There was thus introduced into the law of the United States the same inconsistency which has been noticed in the English law. The children of citizens born abroad are citizens *jure sanguinis*, while the children of aliens, born in the territory of the United States, are also citizens *jure soli*. Such was the law until 1866. The civil rights act, adopted in that year, and the fourteenth amendment to the constitution, adopted two years later, each contains a definition of citizenship. We have, therefore, to examine these definitions, and their relation to each other and to the rule of the common law.— The definition contained in the civil rights act, adopted April 9, 1866, (Rev. Stat. 1992), is as follows: "All persons born in the United States, *and not subject to any foreign power*, excluding Indians not taxed, are declared to be citizens of the United States." This act confirms the *jus soli*, but exempts from its operation: 1. All persons subject to a foreign power. The meaning of the clause is clear, but its practical application presents considerable difficulty. How are our courts to determine whether a person is subject to a foreign power? Our municipal law certainly does not afford any answer to this question; nor does international law. The answer is to be found only in the various municipal laws which govern foreign nations. It can not be that the judge or diplomatic official, who is called upon to decide the question of nationality, is to scrutinize and interpret these foreign laws *ex officio*. Nor can it be that he is to call upon the party asserting citizenship to prove the negative contained in the law. It can only mean that if the individual born in the United States show, or if it be shown against him, that another government claims him or according to its law may claim him as its subject, he is then not to be regarded as a citizen of the United States. But until such claim be actually raised by a foreign government, or until it be shown that the law of some foreign state makes such a claim possible, the person born in the United States is to be deemed its citizen. The object of this change in the law is presumably to avoid conflicts of nationality: the clause is inserted in a spirit of international comity. The legislator could hardly have gone further either in the observance of international comity or in the sacrifice of national dignity. Our law is brought into harmony with foreign legislations by being made dependent upon them in its operation. The effect of the statute is to place in doubt the nationality of a person born on our soil of alien parents. *Prima facie*, such person is a citizen; but it is open to him, or to any person attacking his citizenship, to show that he is claimed by his father's country under the *jus sanguinis*. This claim could not in all cases be shown to exist. The father might have lost his foreign nationality before the child's birth; *e. g.*, by absence of a certain duration. Or the person himself might thus have lost his foreign nationality. (See below: Comparison of Existing Legislations, Loss of Nationality.) — 2. The act excludes from the operation of the *jus soli* non-taxed Indians. This is unnecessary; for, as we have seen, these persons are not born under the actual obedience of the United States, and are not citizens by common law.— The definition contained in the fourteenth amendment to the constitution, adopted July 28, 1868, is as follows: "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the state in which they reside." This definition simply reproduces the rule of the common law. All persons born in the territory of the United States are its citizens, provided they are also born subject to its jurisdiction. But except foreign envoys and the members of their households, and members of Indian tribes recognized by the government as distinct political communities, all per-

sons are subject to the jurisdiction of the United States so long as they are in its territory. In our territory, the alien is "subjected," no less completely than the citizen, to the jurisdiction of our courts (jurisdiction in the narrower sense) and to the general authority of our government (jurisdiction in the wider sense). Aliens, in the language of the common law, are temporary subjects of the state in which they sojourn; they owe the sovereign who harbors them in his domains temporary or local allegiance. The phrase "born subject to the jurisdiction" is therefore precisely equivalent to the common law expression "born under the actual obedience." * — The constitution, then, invests with citizenship all persons born under the jurisdiction or obedience of the United States, without regard to the nationality of their parents or to the opposing claims of foreign states. The civil rights act, as we have seen, declares that such persons are not citizens if claimed as subjects by any foreign power. But it is obvious that where citizenship is conferred by the constitution it can not be withheld by an act of congress. The definition contained in the civil rights act, in so far as it conflicts with the definition contained in the constitution, is therefore void. — The main purpose of the fourteenth amendment was to establish the citizenship of the negro. (Slaughter-house case, 16 Wallace, 73.) The citizenship of the free negro had been denied, in the Dred Scott case, on the assumption that citizenship and subjection were not identical ideas; that a person might be a subject of the United States without being its citizen. In declaring that citizenship is acquired in the same manner in which subjection is established at common law, the fourteenth amendment has placed the equivalency of these terms, and thus the citizenship of the negro, beyond the possibility of a doubt.

Naturalization and Expatriation in the United States. Section eight of article one of the constitution empowered congress "to establish an uniform rule of naturalization." This power was first exercised in the act of March 26, 1790. This act provided that, under certain conditions, any free white alien might be admitted to citizenship by any court of record in the state in which he resided. The conditions were: previous residence of two years in the United States and of one year in the state; good character; and oath "to support the constitution of the United States." The acts of Jan. 29, 1795, and June 18, 1798, increased the term of residence (in the United States) necessary for naturalization first to five and then to fourteen years. The act of 1795 also added a new condition, viz., a preliminary declaration of intention to become a citizen and to abjure the prior allegiance. The act now in force is that passed April 14, 1802. The requirements of this act are: 1. Preliminary declaration (as under the act of 1795) three years before admission. (But the act of May 26, 1824, section 4, permits this declaration to be made two years before admission.) 2. Proof of five years' residence in the United States and one year's residence in the state. 3 Proof of good conduct, attachment to the principles of the constitution, etc. 4. Renunciation of any title or order of nobility. 5. Declaration, on oath or affirmation, that he (the person desiring admission) will support the constitution of the United States and abjures his prior allegiance. 6. No alien may be naturalized if his government is, at the time, at war with the United States. The first or the second of the above conditions is relaxed or removed: 1, in the case of aliens who have resided three years or more in the United States before reaching the age of twenty-one, (act of May 26, 1824); 2, in the case of aliens who have enlisted in the armies of the United States and received honorable discharge, (act of July 17, 1862); 3, in the case of alien seamen taking service in our merchant marine, (act of June 7, 1872).—The naturalized citizen is not eligible, under the constitution of the United States, to the presidency or vice-presidency; nor may he be chosen as representative until seven years, nor as senator until nine years, after his naturalization. But, with these exceptions, the alien obtains by naturalization the full civil and political status of a native citizen.—The American law of naturalization, as compared with European legislation on this subject, exhibits certain new features. In the old states of Europe there is little foreign influx, and naturalization is an exceptional event. In the new states of America, states established by immigration, naturalization is a constant factor, it may almost be said a normal element, in the national growth. Our law of naturalization is based upon the idea that the alien who comes to our country *to stay*, thereby becomes a member of the body social and must be admitted to the body politic. Naturalization in Europe was and is a favor, bestowed upon the individual at the pleasure of the legislative or at the discretion of the executive. Naturalization in America has been, since 1790, a right not to be withheld from any person who complies with certain legally established conditions. Its bestowal is vested in the judiciary, because this is the de-

* The phrase is thus construed in McKay *vs.* Campbell, 2 Sawyer, 118. A dictum of Mr. Justice Miller in the "Slaughter-house case," 16 Wallace, 73, implies a different interpretation. "The phrase 'subject to its jurisdiction,'" he says, "was intended to exclude * * * children of ministers, consuls, and citizens or subjects of foreign countries born within the United States." If this was intended, the intention has not been realized; for the clause can not be so construed as to exclude the children of (non-exterritorial) aliens. Mr. Justice Miller apparently assumes that the phrase "subject to the jurisdiction" means subject to the sovereignty—subject as opposed to alien. If now, for the sake of argument, we grant this; if we read: All persons born in the United States and subject thereto are citizens; how is the word *subject* then to be construed? Who are "subjects" of the United States? The constitution and the laws of the United States afford us no answer; we must have recourse to the common law. But by common law all persons born in the territory of a state and under the actual obedience of its sovereign are its subjects, whatever the nationality of the parents. To make Mr. Justice Miller's construction possible, the sentence should read: All persons born in the United States *of parents* subject thereto are citizens.

partment of government which properly passes upon questions of right. The effect of naturalization was usually restricted, in Europe, to the territory of the adoptive state. This restriction, viewed from the American standpoint, is a wholly unreasonable one. The individual is not naturalized in the United States merely because it is desired to relieve him from certain disabilities attached to alienage; he is invested with the rights of a citizen because he is already one of our people. By naturalization, therefore, he is completely incorporated in our body politic. It seems to us only reasonable that he should everywhere be regarded as we regard him, as an American citizen in the fullest sense of the word. It seems preposterous that the state which he has abandoned should still claim him as its subject. But as soon as our government attempted to obtain from the governments of Europe a recognition of the "right of expatriation," we were confronted not only with the statement that European law knew no such right, but also with the question whether any such right existed at American law. — Before entering upon the discussion of the "right of expatriation," it will be well to determine what the phrase means. Expatriation is the dissolution of that legal relation which we term nationality. It is obvious that a legal relation can be terminated only by operation of law. When we speak of a legal relation as being extinguished by the operation of certain facts, (*e. g.*, by the acts of an individual), we mean that the law attaches to these facts the result or effect of extinguishing the legal relation. A right of the individual to expatriate himself can only mean the power of doing something to which the law attaches the effect of expatriation.* The question whether the American citizen possesses the right of expatriation should therefore be stated as follows: Does the law of the United States attach to any acts of its citizens the effect of extinguishing their nationality? The constitution is wholly silent upon this matter; and, until 1868, no act was passed by congress regulating or even referring to expatriation. Until 1868, then, the common law remained in force. But the common law does not give to any act of the individual the effect of expatriation. — Expatriation was pleaded, before 1868, in a number of cases decided by the supreme court. In no case was it held to have taken place. In no case, it is true, was the decision based upon the common-law doctrine of perpetual allegiance. In every case in which the court denied that expatriation had taken place, the decision was based either upon the inadequacy of the acts from which it was claimed that expatriation resulted, or upon the fact that these acts were done in fraud of the law. But if the possibility of self-expatriation has been neither affirmed nor denied in the *decisions* of the supreme court, some of its leading members have clearly indicated their opinion in the matter. The gist of their *dicta* is that in the absence of a law authorizing self-expatriation the American citizen can not divest himself of his allegiance. This was also the opinion of Chancellor Kent. (Comm. II., 49.) — But in spite of the apparent obviousness of this conclusion, and the array of authority by which it is supported, a contrary current of opinion has existed from the very beginning of our national existence. It has been asserted by the majority of our politicians, and by some of our jurists, that the English doctrine of perpetual allegiance has never been a rule of our law. In many cases this opinion rested on the failure to distinguish between emigration and expatriation; in others upon the assumption that emigration necessarily results in expatriation. In the absence of special restraint, it was said, the American may emigrate; *therefore* he can expatriate himself. Those who avoided these errors argued that freedom of emigration was at least inconsistent with the theory of perpetual allegiance. This is doubtless true; it is also true, as these jurists asserted, that the naturalization of aliens and the abjuration of the old allegiance required by our naturalization laws are strikingly inconsistent with the theory that no person by his own act can divest himself of his allegiance. But England also has permitted emigration and has naturalized aliens for centuries, without attributing to emigration or naturalization acquired in a foreign country the effect of extinguishing English nationality. It has never been held, under any system of jurisprudence, that an established rule of law is abrogated by the adoption of another rule perfectly compatible with the first in its operation and inconsistent with it in theory only. — In 1856 Attorney General Cushing furnished Secretary Marcy with an opinion asserting the right of the American citizen to expatriate himself. The opinion was evoked by a question from a foreign minister, which the secretary of state requested the attorney general to answer. Mr. Cushing argued: 1. That the legislation of the United States is inconsistent with the theory of indelible allegiance. This argument has been noticed and the answer indicated. Two rules of law may be inconsistent and yet both may be law. 2. That expatriation is a natural right. Assuming, for the sake of argument, that there are "natural rights" and that self-expatriation is one of them, it in nowise follows that a citizen of the United States may expatriate himself. The law which restricts or denies a natural right may be a bad law, but is not the less on that account law. 3. That the expatriation of the individual by his own act has been recognized by the legislation of several of our states, and "has thus become a part of our public law." Undoubtedly; but not a part of that part of the public law which we are now considering, viz., the federal law. 4. That the separation of the colonies from England

* Expatriation is often confounded with emigration. Expatriation is a legal conception: emigration is simply a fact to which the legal result of expatriation may or may not be attached. Few legislations give to emigration *per se* the effect of expatriation.

was a complete denial of the claim that allegiance may not be cast off without the consent of the sovereign. It is assumed, in this argument, that a declaration of independence made by an entire community is analogous to a renunciation of allegiance made by an individual; and that if one was admissible the other must be. If this analogy be admitted, it may be answered that, until our independence was recognized by England, the dissolution of allegiance effected by the declaration of congress was a *de facto* dissolution only, like that effected by the acts of secession which certain of our states passed in 1861. Such a dissolution of allegiance a citizen may doubtless effect by emigrating and renouncing his obligations to his native country. But the cases which Mr. Cushing compares are not analogous. The American declaration of independence was a revolutionary act. Revolutions may create states, but not precedents for the administration of municipal law in those states. — On these grounds, however, Mr. Cushing decides that the rule of the common law is not a part of our law, and that the American may expatriate himself. But in what manner? To what acts of the individual is the law to attach the result of expatriation? To renunciation simply, without emigration? Or to emigration without renunciation? Or only to both combined? Mr. Cushing wisely decides that both renunciation and emigration are necessary, but assigns no warrant of law either for his selection of this method or his rejection of the others. — But why did not congress cut this legal knot by the adoption of a law regulating expatriation? There were two difficulties in the way. It was objected by many of our politicians that the passage of such a law would imply that self-expatriation had not previously been possible. The second difficulty was more serious. In many of our states, no persons except citizens of the United States and such aliens as have declared their intention of becoming citizens are able to hold real property. The expatriation of a citizen would therefore entail the forfeiture of his real estate. The difficulty is the same which so long retarded the reform of the English law. But the difficulty is with us greater. For parliament was able to remove the civil disabilities of alienage before touching the question of expatriation, but congress has no such power. — The only law relating to expatriation which congress has passed up to the present time, is the "act concerning the rights of American citizens in foreign states," approved July 27, 1868. The preamble declares expatriation to be "a natural and inherent right of all people." Then follows the enactment, "That any declaration, instruction, opinion, order or decision of any officer of this government which denies, restricts, impairs or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." It is difficult to see what effect can be given to this law, as far as the self-expatriation of the American citizen is concerned. The judicial and executive departments of government are instructed to recognize the "right of expatriation," but no light is thrown upon the cardinal question how this right is to be exercised. To what acts of the individual is the effect of expatriation to be attached? Apparently, since expatriation is declared to be a natural and inherent right which may not even be restricted, impaired or questioned, *any acts* which clearly indicate the intention of the individual to put off his allegiance will suffice; *e. g.*, abjuration of allegiance before a notary public. But no one is likely to maintain that this lay in the intention of the legislator. But if some acts are insufficient, what acts are sufficient? — The executive department has proceeded itself to fill the gap in the law; with what legal right will not here be discussed. Protection has been refused to a number of native and naturalized citizens of the United States, resident in foreign states, on the ground that they have expatriated themselves. As far as the department of state can confer it, American citizens may accordingly be said to enjoy (?) the right of expatriation. If the courts, also, shall decide that self-expatriation has been made possible by the act of 1868, and shall themselves proceed, as the executive has done, to determine what acts of the individual constitute expatriation, the right of the American citizen to expatriate himself may obtain practical recognition in another respect. It may be held that the real property of the expatriated American, if situated in a state whose law excludes aliens from the ownership of land, escheats to the state. — The possibility of self-expatriation has been discussed in the above pages with reference simply to the municipal law of the United States. Under the expatriation treaties concluded by our government (see below) the American citizen may undoubtedly divest himself of his citizenship.

FOREIGN RELATIONS OF THE UNITED STATES.

Conflicts of Nationality. When a citizen of the United States is claimed by a foreign state as its citizen or subject, on grounds recognized by American law as establishing nationality, the American government does not ordinarily attempt to protect this double citizen against the foreign state which claims his allegiance. The American government, like the English, recognizes as a rule the right of every state to enforce its law of nationality in its own territory. The son of an American father, born abroad, is not protected against the state in whose territory he was born, if that state claims him *jure soli*. (Consular Regulations, art. xi., sec. 115.) The son of an alien father, born in the jurisdiction of the United States, is not protected against his father's state, if claimed by the latter *jure sanguinis*. (Case of François Heinreich,* U. S. For. Rel., 1872, p. 172.) An American citizen who causes or permits himself to be

* Heinreich was an American *jure soli*, but an Austrian *jure sanguinis*. The refusal of protection was, in this case, erroneously based upon the assumption that Heinreich had become *by naturalization* a subject of Austria.

naturalized in a foreign state is, as a matter of course, not protected against the state of his adoption; for, in the view of our department of state, he is no longer an American citizen even within our jurisdiction. But his minor children also, though born before his naturalization and therefore born American citizens, are, if claimed by the father's adopted state, to be deemed its citizens so long as they are in its territory and jurisdiction. ("Santiago" Smith's Children, For. Rel., 1879, pp. 815, 816, 825.) Nor, until 1859, did our government claim the right to protect its naturalized citizens against the states to which these persons owed original allegiance. If the state to which the emigrant belonged by birth chose to consider him as its subject in spite of his American naturalization, it had, within its jurisdiction, the power and the right to treat him as such. Our government, of course, resisted the attempt of England to enforce its law of nationality within *our* jurisdiction, by means of the so-called "right of visitation and search"; and the repeated invasion of our "floating territory" by English officers was the principal cause of the war of 1812. During this war, as we have seen, the attempt of England to place naturalized Americans on trial for treason was met by the United States with threat of reprisal. But this was an act of war, not an exercise of the ordinary right of protection.* The right of protecting our naturalized citizens against the state to which they owed original allegiance was not only never asserted before 1859, but was expressly and repeatedly disavowed by our ministers in foreign countries and by our department of state. But while our government recognized the right of foreign states to enforce their own law of nationality in their own territories, it repeatedly endeavored to secure by negotiation the modification of the foreign law. It argued, with justice, that the individual who had ceased to be a member of the body social ought not to be deemed a member of the body politic. — Comparatively few of the states to which our naturalized citizens originally belonged denied the possibility of self-expatriation. Great Britain, Russia, and some cantons of Switzerland, belonged to this category. The legislations of these states recognized no dissolution of allegiance without the express and special consent of the state. — In Prussia, and in most of the German states, authorized emigration or unauthorized absence of a certain duration (in Prussia, by the law of Dec. 21, 1842, ten years) effected expatriation. By the *Code Napoléon* naturalization acquired in a foreign country was one of the facts to which the law attached the loss of French nationality. But in all the legislations of this second category, expatriation was understood to mean, primarily, loss of the rights of a citizen; and it was by no means admitted that the duties of a citizen were extinguished with the rights. — Our government accordingly endeavored to secure, by reform of the foreign legislations or by treaty, the recognition of the following principles: 1, That naturalization effects expatriation; 2, That expatriation extinguishes not only the rights of the citizen but also the rights of the state over the citizen. — But pending the adoption of these principles, the American government (until 1859) recognized the right of each state to enforce its own law in its own territory, and made no attempt to protect its naturalized citizens against their old governments. In the year 1859 our government changed its attitude. Secretary Cass asserted that the naturalized American, returning to his native country, "returns as an American citizen and in no other character." (Instructions to Mr. Wright, July 8, 1859.) President Buchanan declared, "Our government is bound to protect our naturalized citizens everywhere." (Message, Dec. 3, 1860.) The refusal to recognize the territorial validity of the foreign law was based upon the assertion that the right of expatriation was a right established by the law of nations. The "right of expatriation," in this connection, meant, of course, the right of the individual to divest himself of his obligations to his native country by migrating to and acquiring naturalization in another; and the claim of the American government, legally stated, was this: That international law (independently of treaty) attaches to emigration and subsequent naturalization the extinction of the prior allegiance. But international law, being enacted and enforced by no superior, has no existence except by the agreement of the nations which it governs. A rule, therefore, which was not recognized, a score of years ago, by the majority of civilized states, and to which no effect is given to-day except by force of municipal legislation or of treaty, can hardly be termed a rule of international law. The consensus of civilized nations is *now* so general as to the propriety of its observance that it may easily come to be regarded as a rule of international law a generation or two hence. But it certainly was not such in 1859. Legally, then, the ground taken by the American government in 1859 was indefensible. Politically, it was well chosen; it gave our diplomacy a basis for incessant agitation. The American claim of protection was of course denied, but despite all denials was steadily renewed. In denying the American claim, each foreign government knew itself to be legally in the right; but with each renewal of the controversy it became more obvious that the existing law was inequitable and must be reformed.

The Expatriation Treaties. The principles advocated by the United States first obtained international recognition in the treaty with the North German confederation, negotiated by Minister Bancroft, and signed Feb. 22, 1868. The difficulties between the United States and Prussia had centred in the question of military duty. The Prussian who left his country without authorization, before

* During the war between England and France, at the close of the last century, France was similarly threatened with reprisals in case it should treat as traitors any *emigrés* serving under the English flag. But these persons were not claimed by England as its subjects.

or during the period in which his service was due to the state, was liable, upon his return, to punishment, and, if he was still within the military age, to compulsory enlistment. But if during his absence the Prussian had acquired American citizenship, our government maintained (since 1859) that he was no longer a Prussian and owed the Prussian state no military service. His duties to the Prussian state were terminated at the moment of his naturalization. In fact, our government went further than this, and asserted that the Prussian naturalized in America was not liable to punishment for non-performance of military service, unless that service was actually due at the moment of emigration. — In the treaty with the North German confederation, every point of the American claim is conceded. Not only is it agreed that naturalization shall extinguish the duties of the citizen to his former state, but also that the naturalized citizen shall not be punished except for offenses committed before emigration. The extinction of duties effected by naturalization is thus dated back to and includes the act of emigration. The essential provisions of this treaty are briefly as follows: Citizens of the one nation who have become naturalized citizens of the other shall be regarded and treated as citizens of the latter nation, if they have resided uninterruptedly within its territory for five years. (Art. 1.) The naturalized citizen is liable, on return to his original country, to trial and punishment for offenses committed before emigration. (Art. 2.) If a naturalized citizen renews his residence in his former country without the intent to return to his adopted country, he shall be held to have renounced his naturalization. "The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country." (Art. 4.) The purpose of the fourth article is obvious. Without some such limitation, the treaty would enable any German, by a temporary residence of five years in America, to escape military duty in his native country. American citizenship would have been sought by persons who had no intention of becoming in reality members of the American people: it would have been sought simply as a means of obtaining a privileged position in a foreign country. The provisions of this article have been criticized because the persons whom it affects seem to be left without any country. They have forfeited their naturalization without regaining their former nationality. But if our naturalized citizen has forfeited his American citizenship it is no concern of ours whether he has regained his German nationality or not, and *vice versa*. The reacquisition of the former nationality is an internal, not an international, question. The matter is therefore left, as it should be, to be settled by each nation for itself. The German government settles it by compelling the naturalized American, at the end of the two years, to reassume German nationality or leave the country. During the same year (1868) Minister Bancroft concluded similar treaties with Bavaria, Baden, Würtemberg and Hesse. Expatriation treaties based upon the same principles were made, in 1868, with Mexico, Great Britain and Belgium; in 1869, with Sweden and Norway; in 1870, with Austria; in 1872, with Ecuador and Denmark. The treaty of 1868 with Great Britain was of a preliminary character, the British government not desiring to anticipate the action of parliament on the question of expatriation. A formal treaty was concluded immediately after the passage of the English naturalization act of 1870. — The majority of these treaties correspond with the North German treaty in attaching the effect of expatriation to naturalization *and* five years' residence. The treaties with Belgium, Denmark, Ecuador and Great Britain provide that naturalization shall extinguish the former nationality without reference to any term of residence in the adopted country. All the treaties agree that the naturalized citizen shall not be punished by his original country except for offenses committed before emigration. All the treaties further agree in providing that the naturalized citizen may renounce his naturalization; and the majority of them, like the North German treaty, attach this result to renewed residence in the original country when such residence exceeds two years. But this latter clause does not appear in the treaties with Austria, Baden, Belgium and Great Britain; and under the Mexican treaty the naturalized citizen may avoid the forfeiture of his naturalization by proving his intent to return to his adopted country. A number of the treaties containing the two years clause explain, in the text or in the protocol, that the two years residence in the old country does not of itself re-establish the old nationality. These treaties give to American naturalization, in the vast majority of cases, the effect of extinguishing the original allegiance. Nearly 90 per cent. of the immigrants whom Europe sent us in 1881, and nearly 93 per cent. of the total European immigration to the United States from 1821 to 1881, came from countries with which we now have expatriation treaties. — States with which we have no such treaties, but whose municipal law attaches to a foreign naturalization the effect of expatriation, furnished 5.4 per cent. of our total European immigration from 1821 to 1881; 6.2 per cent. in 1881. In all the states belonging to this category, it is now held that expatriation extinguishes the duties as well as the rights of the citizen. — The rest of our European immigration (1821–81, 1.9 per cent.; 1881, 4.4 per cent.) is derived from Russia and Switzerland. Russia does not permit the individual to expatriate himself without special authorization. Switzerland permits self-expatriation, but does not attach this result to naturalization acquired in a foreign country.

COMPARISON OF EXISTING LEGISLATIONS.

Acquisition by Birth. All modern states, even those which apply the *jus soli* within their respective territories, claim as citizens the children of citi-

zen parents born abroad. But many legislations make the derivative citizenship of the child born abroad dependent upon his return and to residence in the father's country (Portugal, Bolivia, Brazil, Chili, Colombia, Ecuador, Paraguay and Uruguay. Peru requires the inscription of the child's name in the civil register. In the Argentine republic and in Venezuela, the individual born abroad must declare, when of full age, that he elects the nationality of his parents.) The same result is obtained, in other legislations, by attaching to residence in a foreign country without intent to return, or to absence of certain duration, the effect of expatriation. The English act of 1870 permits the child of an Englishman, born abroad, to make when of full age a declaration of alienage. — But although the *jus sanguinis* or principle of filiation is applied by all modern states to the children of their citizens born abroad, no such general agreement exists in the treatment of children of aliens born within their respective territories. Existing legislations may be divided, in this respect, into five classes.— 1. Pure *jus sanguinis*. In Austria, Germany, Hungary, Sweden and Switzerland the child of an alien, born in the territory, is born an alien and remains an alien always unless he becomes naturalized. The conditions under which he may obtain naturalization differ in no respect from those prescribed for the naturalization of other aliens. — 2. Modified *jus sanguinis*. In France the child of an alien, born in the territory, is born an alien; but when of full age he has *droit d'option* of French nationality. That is, he has the right to become a Frenchman if he chooses, and he becomes a Frenchman by declaring that such is his choice. He must also declare that it is his intention to live in France; and if at the date of his declaration he is resident in a foreign country, he must acquire a French domicile within a year. This system, established by the Code Napoleon (Art. 9) has been adopted with slight variations in the legislations of Belgium, Greece, Luxemburg, Monaco, Spain, Rumania, Russia, Turkey and Costa Rica.—3. Pure *jus soli*. The children of aliens, born in the territory, are born members of the state in Denmark, Norway, Bulgaria, the United States, Hayti, the Argentine republic, Bolivia, Brazil, Chili, Colombia, Ecuador, Guatemala, Peru, Uruguay and Venezuela. But under the laws of some of the above states, the nationality thus established is lost if the child becomes resident in the father's state (Denmark, Norway, Guatemala).— 4. Modified *jus soli*. The children of aliens born in England are natural-born Englishmen, but when of full age may make a declaration of alienage. The same system obtains in Portugal. In Mexico the child of an alien, born in the territory, is an alien as long as he remains under the paternal authority. (At Spanish as at Roman law a person of full age may be subject to the *patria potestas*.) But as soon as he is freed from the paternal authority, as soon as he becomes *sui juris*, he becomes a Mexican unless he reclaims his father's nationality.— 5. Combination of *jus soli* and *jus sanguinis*. The Italian code and the Dutch law of July 29, 1850, take an additional element into consideration, viz., the domicile of the parents. The child born in the Netherlands is a Netherlander if his parents have resided in the kingdom for three years or if they have resided there eighteen months after declaring their intention to establish their domicile there. The acquisition of nationality in this case is definitive: the Dutch law permits no reclamation of the father's nationality. Under the Italian code the child born in the territory is born an Italian if his parents have resided in the kingdom uninterruptedly for ten years; but on reaching full age he may reclaim the nationality of his father. Under both legislations, the children of non-domiciled aliens, born in the territory, are born aliens; but they have the right of electing the nationality of the state in which they were born (*droit d'option*).— A word as to the advantages and disadvantages of the above systems. The *jus soli* or territorial system has the advantage of attaching nationality to a fact easily proved. But it has the disadvantage of imposing nationality, in a certain number of cases, upon persons whom it is absurd to regard as members of the state in which they happen to be born. If the parents were not domiciled in the territory, and if the child is removed to and grows up in the father's country, it is preposterous to regard him as a member of any other than his father's state. The *jus sanguinis* or system of filiation is not open to this objection, but is open to others equally serious. The nationality of the individual can be proved only by showing the nationality of the father; but this depends again upon the nationality of the grandfather, and so on without end. Under the *jus sanguinis*, again, the members of a family originally foreign but established for generations in the state may retain their alien character, if they choose, indefinitely. Of course they will choose to do this wherever the burdens of citizenship are greater than the disadvantages of alienage; *e. g.*, in all states where universal and compulsory military service exists. In all such states the *jus sanguinis* will create a privileged class within the population, a class exempted from political duties because of its inherited alienage. This has notably been the result of the establishment of the *jus sanguinis* in France. The *droit d'option* given to all persons born in the territory is seldom exercised. In order to check the rapid and alarming increase of the resident foreign population *born on French soil*, French legislation has been obliged to revert, in a measure, to the territorial system. A law of Feb. 12, 1851, provided that all persons born in France whose fathers were also born there should be deemed Frenchmen, unless on reaching majority they reclaimed the paternal nationality. This law did not have the desired effect. Alienage was regularly reclaimed by the persons in question, and the domiciled foreign population continued to increase. A law amending the law of 1851 was accordingly

adopted Dec. 16, 1874. Under this latter law the individual who desires to reclaim his father's nationality is required to produce a certificate (*attestation*) from the government of his father's state, showing that it regards him as its citizen. This he will rarely be able to do. (See below: Loss of Nationality.) — The disadvantages of the *jus soli* on the one hand and of the *jus sanguinis* on the other are in the main avoided by the Dutch law of 1850, described above. The combination of the two systems in that law seems the most satisfactory solution of the problem yet attained.

Naturalization signifies in the widest sense the bestowal of nationality. So the children of Englishmen born out of the territory were said to be naturalized by the acts of 25 Edw. III., 7 Ann, etc. Commonly, however, naturalization means the acquisition of nationality otherwise than by birth, the bestowal of nationality upon a person who is by birth an alien. But nationality may either be imposed upon an alien *de plein droit*, without regard to his wishes in the matter; or it may be bestowed upon him at his own request (voluntary naturalization). — 1. Naturalization is conferred *de plein droit* by all existing legislations upon the alien woman who marries a citizen. At English common law, it is true, marriage did not have this effect; but the rule of the common law has been superseded by statute in both England (7 and 8 Vic., c. 66) and in the United States (Act of Feb. 10, 1855). — Naturalization *de plein droit* is conferred by the laws of Denmark and of Norway upon all persons who become domiciled in the territory of these states. At old Spanish law, the alien who was domiciled in the kingdom, or who resided there under circumstances which showed *animus commorandi* (marriage with a Spanish woman, possession of real property, exercise of a profession, keeping a shop) acquired *ipso facto* communal citizenship (*vecindad*), and these communal citizens were regarded as Spanish subjects. But a law of 1870 enacts that the *avecindados* shall be regarded as Spaniards only when they have caused themselves to be registered as such and have renounced their prior nationality. At present, therefore, the acquisition of *vecindad* is simply a means of voluntary naturalization. The law of the *vecindad* was transplanted from Spain to the Spanish colonies in America; and, until recently, many South American legislations outdid the Spanish model in the matter of compulsory naturalization. But at the present time naturalization has become wholly voluntary in all these states except Bolivia and Venezuela. — A few countries (*e. g.*, Germany and Mexico) impose their nationality upon all persons who enter the service of the state. But in this case the intent of the individual to obtain naturalization may be presumed to exist without any expressed declaration; and this method of naturalization may fairly be termed a voluntary one. — 2. Voluntary naturalization is provided for in all existing legislations; but the method, conditions and effects of naturalization vary greatly in different countries. In all the cases where a union of states exists, in Europe, naturalization is left to the single states. This is the case not only when the union is merely personal or the bond of federation loose (the Netherlands and Luxemburg; Russia, Poland and Finland; Norway and Sweden; Austria and Hungary), but also in the firmer federal unions (Switzerland, Germany). But in Switzerland and in the German empire the federal law determines at least the conditions of naturalization. In the British empire each colony has the power of naturalization, and fixes the conditions upon which it shall be granted. — The department of government by which naturalization is conferred is different in different states. Where absolute monarchy exists this power is of course vested in the crown. In constitutional states the right belongs in principle to the legislative, and in many states it is directly exercised by the legislature (Belgium, Bulgaria, Denmark, Luxemburg, the Netherlands, Norway, Rumania, and the majority of the Swiss cantons). In other states naturalization is bestowed by the administrative department, under conditions prescribed by law (England, France, Germany, Hungary and Portugal). In England, besides the naturalization conferred by the secretary of state, naturalization by virtue of the royal prerogative and naturalization by special act of parliament are still possible. A mixed system exists also in Italy, Greece and Spain. — The power of naturalization, wherever vested, is discretionary in all European states. Although the alien complies with all the conditions prescribed by law, naturalization may be refused him. (Except in Spain, where the alien may acquire *vecindad* by his own act, and then by abjuring his prior allegiance may become a Spaniard.) In the United States the theory of naturalization is a different one. The alien who fulfills the legal conditions of naturalization has a right to be naturalized, and naturalization is conferred by the judiciary. The same system exists in the dominion of Canada. In Central and South America, naturalization is bestowed either by the executive or the legislative, and the bestowal is discretionary. But since the institute of the *vecindad* exists in the majority of the Spanish-American states, it is usually possible for the alien to acquire naturalization by obtaining domicile and causing himself to be registered as a citizen. — The conditions prescribed by law for naturalization differ widely in different states. Present domicile or the intent to establish domicile in the country is always required, unless in the case of those engaged or intending to engage in the service of the state. Residence of a certain duration is usually demanded, but foreign residence in the service of the state is accepted as an equivalent by France, England and Brazil. Good moral character is generally required, and, in some states, visible means of support (Finland, Germany, Hungary, Portugal, Sweden, many Swiss cantons, Mexico, Chili and Peru). — By naturalization the alien always obtains full civil rights, but not al-

ways the political rights of a natural-born citizen. But the tendency of modern legislation is to establish complete equality between native and naturalized citizens. — Many European states refuse to protect their naturalized citizen against his native country, if the latter still claims him as its citizen. The Netherlands, Luxemburg and Switzerland refuse to naturalize aliens when their naturalization seems likely to produce international difficulties.

Status of the Family of a Naturalized Citizen. 1. *The wife* is naturalized *de plein droit*, in most countries, by the naturalization of the husband. By the laws of England and Italy, however, the naturalization of the husband extends to the wife only when she resides with him in the adopted country. In Germany and in Switzerland the wife may be expressly excluded. In France she must be expressly included, and that at her own desire: *i. e.*, the French jurisprudence repudiates entirely the naturalization of the wife *de plein droit*. — 2. *The children.* The naturalization of the father usually extends to the minor children. But they may be expressly excluded (Germany, Switzerland). They are included only when resident in the father's adopted country (England, Italy, United States). The children are included during their minority, but may reclaim the father's original nationality on reaching full age (Italy, Portugal). — The naturalization of the father does not extend to the children born before his naturalization (Belgium, France, Luxemburg, Russia, Spain, Sweden, Turkey, the Argentine republic and Brazil). But in many of these states the children, on reaching majority, may elect the father's acquired nationality.

Expatriation, or Loss of Nationality. Existing legislations may be divided, as regards loss of nationality, into two classes; viz., those in which expatriation is not possible without the express and special consent of the sovereign, and those which attach the result of expatriation to some act or acts of the individual. — 1. In Russia and in Turkey a woman becomes an alien by marrying an alien, and in Russia a naturalized subject may renounce his naturalization; but the natural-born male subject can not expatriate himself in either state without express authorization. The Russian or Ottoman who emigrates and acquires a foreign naturalization without the consent of his sovereign, exposes himself to sentence of banishment; but although banished he retains his original nationality. — In a number of South American states it is doubtful whether the individual can or can not expatriate himself. The constitutions of these states contain rules concerning the loss of *citizenship* (*ciudadania*), and it is uncertain whether loss of nationality is meant, or merely loss of political rights. The latter seems to be the accepted interpretation in Peru and Ecuador. In these states, then, self-expatriation is impossible. In the Argentine confederation and in Venezuela allegiance is clearly indissoluble by any act of the individual. — 2. The great majority of modern states attach the effect of expatriation to some act or acts of the individual. In many cases it is imposed as a punishment: in Germany, for example, the unauthorized performance of ecclesiastical functions, in Bolivia, Paraguay and Uruguay fraudulent bankruptcy, and in Portugal and Brazil sentence of banishment, entail the loss of the national character. Unauthorized entrance into the service of a foreign government effects expatriation by the laws of France, Italy, the Netherlands, Portugal, Mexico, Hayti, Bolivia, Brazil, Chili, Colombia, Paraguay and Uruguay. In other cases the penal character of expatriation is less marked. It results, for example, from emigration simply (Austria, Sweden), from emigration and renunciation (Italy), from foreign residence without the intent to return (Belgium, Denmark, France, the Netherlands, Norway, Hayti), from a foreign residence of ten years without passport or inscription in the consular register (Germany, Hungary). — Expatriation on any of the above grounds is objectionable from the international standpoint as tending to create *heimathlose*, individuals without any country. — International comity demands that the effects of expatriation be attached to those acts and to those acts only which establish a new nationality. These are: (*a*) voluntary naturalization in a foreign state. This is recognized as a cause of expatriation in all the expatriation treaties concluded by the United States and in the legislations of Belgium, England, France, Italy, Luxemburg, Monaco, the Netherlands, Portugal, Spain, Sweden, Mexico, Hayti, Bolivia, Brazil, Chili, Colombia and Uruguay. (*b*) Declaration of alienage, or reclamation of foreign nationality, made by a person whom a foreign state regards as its citizen or subject. For the cases in which this is permitted, see above: Acquisition by Birth. — In Switzerland, abandonment of the native domicile, possession or prospective acquisition of a foreign nationality *and* renunciation of Swiss citizenship are the conditions precedent of expatriation; but the Swiss citizen who has fulfilled all these conditions is not expatriated until a declaration of expatriation has been issued by the proper cantonal authority. — (*c*) On the part of a woman, marriage to a foreigner. This effects expatriation by the laws of almost all modern states (but not in Brazil, Hayti or San Salvador). — *The status of the wife and children* of an expatriated person is different in different legislations. Most states, of course, apply the same rules in this case as in that of naturalization. (See above: Status of the Family of a Naturalized Citizen.) But the rule laid down by England and Italy in reference to the family of a naturalized person is adopted, as regards expatriation, by three other states: Germany, Hungary and Switzerland. That is, in all these states the expatriation of the head of the family extends to the wife and minor children only when they have followed him to his new home. EDMUND MUNROE SMITH.

NATIONS, in Political Economy. From the earliest historical ages humanity has been di-